PUBLIC PROSECUTOR

v.

YATOR BUNTA

HIGH COURT BANDAR SERI BEGAWAN, BRUNEI DARUSSALAM
O'CONNOR J
[CRIMINAL TRIAL NO. 32 OF 1986]
7 APRIL 1987

EVIDENCE: *Confession - Evidence Act - Section 26 - Section 117(1) of the Criminal Procedure Code - Were confessions made while in police custody governed by the Evidence Act or by the Criminal Procedure Code.*

In a criminal trial the prosecution intended to lead evidence of a confession made by the defendant while he was in police custody. Objection was taken to this, on the ground that s. 26 of the Evidence Act applied so as to prohibit reception of the confession. The prosecution submitted that it was s. 117(1) of the Criminal Procedure Code that applied and hence the confession was admissible.

Held:

[1] The origin of s. 26 lay in distrust of what may well happen in police custody. It was not lightly to be assumed that this protection was negated by a mere inference without express words which displaced the exclusionary principle.

[2] If the draftsman of s. 117 of the Criminal Procedure Code intended to dispense with the protection conferred by s. 26 of the Evidence Act, a less equivocal form of words would have had to be used. There was no necessary incompatibility between the two provisions. They were not in *pari materia*. Section 117(1) is a provision of general scope which did not regulate the particular context of a confession made by a person in police custody, catered for by s. 26.

Cases referred to:
Walton v. Bank of Nova Scotia [1964] 1 OR 673
Chorlton v. Lings [1868] LR 4 CP 374
PP v. Ng Goh Weng & Ors. [1979] 1 MLJ 127
Shanmugam v. Comr. for Registration [1962] AC 515

Legislation referred to:
Criminal Procedure Code [Brunei], ss. 117, (1), (3)
Evidence Act 1950 [Brunei], s. 26

For the state - Zabaidah, DPP
For the defendant - David Clidero; M/s. David Clidero & Co.

JUDGMENT

O'Connor J:

In this murder trial the prosecution intended to lead evidence of a confession made by the defendant while he was in police custody. Objection was taken on a number of grounds, only one of which need be considered. I gave an oral ruling with reasons, and promised I would reduce it to writing.

It was submitted that as he was in police custody, s. 26 of the Evidence Act applied so as to prohibit the confession being put in evidence. That section is as follows :

> Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person.

Reliance was placed on the decision of Mr. Commissioner Garcia in *PP v. Emran bin Haji Md. Noor & Ors.*, Criminal Trial No. 22 of 1986, wherein he found that s. 26 of the Evidence Act applied to such circumstances.

The prosecution submitted that s. 26 did not apply, but rather s. 117(1) of the Criminal Procedure Code applied. That reads :

> In any criminal proceedings any statement made by any person, whether it amounts to confession or not or it oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not, by that person to or in the hearing of any police officer shall be admissible in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

Reliance was placed on the decision of the Chief Justice in *PP v. Zainal Abidin bin Ismail & Ors.*, wherein, after considering Mr. Commissioner Garcia's decision, the Chief Justice disagreed with it and held that in such circumstances s. 117(1) of the Code applied.

Mr. Commissioner Garcia held that for s. 117(1) to apply to a person in custody, one would have to imply that the words "any person" in that section, included a person in custody. He held that therefore s. 117 did not "expressly" apply to a person in custody. He found an apparent conflict between s. 26 and s. 117(1). For the meaning of "express provision", he relied on the following passage from *Walton v. Bank of Nova Scotia* [1964] 1 OR 673 at p. 682 where the meaning of the words "unless otherwise expressly provided" were considered:

> In my opinion the word 'expressly' is used in s. 287 in this sense - meaning that a provision of the Act or instrument creating the corporation does not have the effect sought to be attributed to it unless it is stated in express and positive terms, directly and not merely by implication from the language used.

The Chief Justice considered the decision of Mr. Commissioner Garcia and disagreed with it. He pointed out that the Judge did not have a full report of *Walton v. Bank of Nova Scotia*. The Chief Justice cited *Chorlton v. Lings* [1868] LR 4 CP 374 for the meaning of similar phraseology and quoted from that case, at p. 387, where Wilkes J observed :

> It is not easy to conceive that the framer (of Lord Brougham's Act) when he used the word "expressly" meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is clear that whatever the language used necessarily and naturally implies, is expressed thereby.

Of course the word "expressed" may simply mean "stated". In that sense what Wilkes J said is quite correct. However, in my view, where the words "expressly provided" or "express provision" are used, they are clearly not meaning simply "stated", but mean explicit or direct, in distinction to "implied". I agree with the author of Bennions "*Statutory Interpretation*" at p. 245, where he says that Wilkes J put a strained construction on the phrase.

I have available to me the full report of *Walton v. Bank of Nova Scotia*. It reveals that the Court in that case expressly considered *Chorlton v. Lings*, in this passage :

> I should like to add that *Chorlton v. Lings* [1868] LR 4 CP 374, is not to be taken as an authority supporting the appellant's contention that the word "expressly" used in a statute should generally be construed as meaning "what is properly or necessarily implied by language". The rule there laid down must be read in the light of the peculiar facts, for to have given the word "expressly" the meaning contended for in that case would have resulted in the extension of the franchise to women contrary to the usage which had prevailed in England for centuries.

The Chief Justice went on to conclude that s. 117 is incompatible with s. 26 and that s. 117 supersedes s. 26.

I am not bound by either of those decisions. In *PP v. Ng Goh Weng and Ors.* [1979] 1 MLJ 127 the Federal Court of Malaysia held, on similar legislation, that s. 26 was overridden.

The authoritative meaning of the expression "express provision" was stated by the Privy Council in *Shanmugam v. Comr. for Registration* [1962] AC 515 (PC) at p. 527, as follows:

> Their Lordships are of the view that it is correct to state that express provision is provision the applicability of which does not arise by inference ... To be "express provision" with regard to something it is not necessary that that thing should be specially mentioned; it is sufficient that it is directly covered by the language, however broad the language may be which covers it so long as the applicability arises directly from the language used and not by inference therefrom.

Section 26 of the Evidence Act originated in the Indian Evidence Act. It came to Brunei by way of Malaya.

The Indian version did not have the introductory words "Subject to any express provision contained in any written law". Those words were first introduced in the Malayan version. They appear to be intended to give a form of entrenchment to the section. The section gives a right to an accused person and the introductory words, which I emphasize, are an addition to the section as it first appeared, are, in my view, intended to provide, as does an Interpretation Act, a guide to the construction of subsequent legislation that appears to bear on the same subject matter.

The origin of s. 26 lay in a distrust of what may happen to persons in police custody. Such fears were no doubt well founded. One should consider with caution a suggestion that the fears crystallised in the section have been set aside by a side wind, repealed by inference. Section 26 is, in Indian, Malaysia, Brunei, and other places that have the Indian Evidence Act, or a derivative of it, probably the best known provision in all the laws on evidence. It is difficult to conceive that it would not have been in the mind of a person drafting s. 117. Yet s. 117 does not use a phrase such as "Whether in police custody or not". It appears to me that this omission is of great significance when one considers the detailed attributes, set out in s. 117, relating to the statement and its circumstances.

In s. 117(1) the works "made at any time, whether before or after that person is charged" do not, in my opinion, relate to the circumstances of the person in relation to custody or not. They relate to a merely temporal matter, to the sequence, in relation to charging.

A person could be charged and served with a notice under s. 117(3) whilst not in custody. Nothing in s. 117, in my opinion, necessitates that the section apply to a person in custody.

In my view, contrary to that of Mr. Commissioner Garcia and the Chief Justice, there is no conflict between s. 26 and s. 117(1). They are not only reconcilable but are complementary. Section 26 applies to a confession made by a person in custody when he makes it, s. 117(1) applies when a statement is made by a person not in custody.

Also found at [1988] 2 CLJ 351